Supreme Court, U.S.
FILED

09-325 SEP 10 2009

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

ALEXANDRE ARONOV, PETITIONER

v.

JANET NAPOLITANO,
SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY ROMANOVSKY
LAW OFFICES OF GREGORY ROMANOVSKY
12 Marshall Street
Boston, MA 02108

KANNON K. SHANMUGAM
Counsel of Record
ANA C. REYES
GEORGE W. HICKS, JR.
AMY R. DAVIS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

QUESTION PRESENTED

Under 8 U.S.C. 1447(b), an applicant for naturalization may bring suit in federal district court to compel a determination on his application if United States Citizenship and Immigration Services (USCIS) fails to make a determination within 120 days of the applicant's examination. The question presented is as follows:

Whether an applicant for naturalization who brings suit under 8 U.S.C. 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is entitled to attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A).

PARTIES TO THE PROCEEDING

Petitioner is Alexandre Aronov. Respondents are Janet Napolitano, Secretary of Homeland Security; Alejandro Mayorkas, Director, United States Citizenship and Immigration Services; Denis Riordan, District Director, United States Citizenship and Immigration Services; and Robert S. Mueller, III, Director, Federal Bureau of Investigation.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statutory provision involved 2

Statement 2

Reasons for granting the petition 12

A. The decision below conflicts with a decision of the Tenth Circuit and implicates broader disarray among the lower courts 13

B. The court of appeals' decision is erroneous 21

C. The question presented is an important and recurring one that merits the Court's review in this case 27

Conclusion 31

TABLE OF AUTHORITIES

Cases:

Aboeleyoun v. *USCIS*, No. 07-1927, 2008 WL 1883564 (D. Colo. Apr. 25, 2008) 18

Agbotse v. *Napolitano*, No. 09-1115 (W.D. Wash. filed Aug. 5, 2009) 29

Al-Ghanem v. *Gonzales*, No. 06-320, 2007 WL 446047 (D. Utah Feb. 7, 2007) 17

Al-Maleki v. *Holder*, 558 F.3d 1200 (10th Cir. 2009) ..... *passim*

Al-Shaibani v. *Holder*, Nos. 08-35385, 08-35387 & 08-35388, 2009 WL 2257612 (9th Cir. July 29, 2009) 15

Ali v. *Mukasey*, 543 F. Supp. 2d 1272 (W.D. Wash. 2008) 17

Almudallal v. *USCIS*, No. 07-2040, 2008 WL 1995360 (N.D. Ohio May 5, 2008) 18

Bell v. *Board of County Commissioners*, 451 F.3d 1097 (10th Cir. 2006) 20

Page

Cases—continued:

Berishev v. *Chertoff*, 486 F. Supp. 2d 202 (D. Mass. 2007) 17
Buckhannon Board & Care Home, Inc. v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) ..... *passim*
Christina A. ex rel. Jennifer A. v. *Bloomberg*, 315 F.3d 990 (8th Cir. 2003) 19
Davy v. *CIA*, 456 F.3d 162 (D.C. Cir. 2006) 20
Etape v. *Chertoff*, 497 F.3d 379 (4th Cir. 2007) 22
Hernandez v. *Swacina*, No. 09-22642 (S.D. Fla. filed Sept. 4, 2009) 29
Hewitt v. *Helms*, 482 U.S. 755 (1987) 23
INS v. Jean, 496 U.S. 154 (1990) 27
Iqbal v. *Dorochoff*, No. 09-4910 (N.D. Ill. filed Aug. 11, 2009) 29
Irahim v. *Chertoff*, No. 07-2415, 2009 WL 385782 (E.D. Cal. Feb. 10, 2009) 17
John T. ex rel. Paul T. v. *Delaware County Intermediate Unit*, 318 F.3d 545 (3d Cir. 2003) 20
Liu v. *Chertoff*, 538 F. Supp. 2d 1116 (D. Minn. 2008) 18
Osman v. *Mukasey*, 553 F. Supp. 2d 1252 (W.D. Wash. 2008) 18
Othman v. *Chertoff*, 309 Fed. Appx. 792 (5th Cir. 2008) 14, 16
P.N. v. *Seattle School District No. 1*, 474 F.3d 1165 (9th Cir. 2007) 20
Richard S. v. *Department of Developmental Services*, 317 F.3d 1080 (9th Cir. 2002) 21
Roberson v. *Giuliani*, 346 F.3d 75 (2d Cir. 2003) 20
Role Models America, Inc. v. *Brownlee*, 353 F.3d 962 (D.C. Cir. 2004) 26
Saraf v. *Napolitano*, No. 09-1520 (D.D.C. filed Aug. 11, 2009) 29
Shalala v. *Schaefer*, 509 U.S. 292 (1993) 24

Page

Cases—continued:

Shalash v. *Mukasey*, 576 F. Supp. 2d 902 (N.D. Ill. 2008) 18
Simonovskaya v. *Chertoff*, No. 06-11745, 2007 WL 210391 (D. Mass. Jan. 26, 2007) 18
Smalbein ex rel. Estate of Smalbein v. *City of Daytona Beach*, 353 F.3d 901 (11th Cir. 2003) 20
Smyth ex rel. Smyth v. *Rivero*, 282 F.3d 268 (4th Cir.), cert. denied, 537 U.S. 825 (2002) 20
Sole v. *Wyner*, 551 U.S. 74 (2007) 19
United States v. *Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) 22, 29
Utility Automation 2000, Inc. v. *Choctawhatchee Electric Cooperative, Inc.*, 298 F.3d 1238 (11th Cir. 2002) 19
Wagner v. *Chertoff*, 607 F. Supp. 2d 1192 (D. Nev. 2009) 18
Walker v. *Calumet City*, 565 F.3d 1031 (7th Cir. 2009) 20
Wilderness Society v. *Babbitt*, 5 F.3d 383 (9th Cir. 1993) 26

Statutes and regulations:

Americans with Disabilities Act, 42 U.S.C. 12205 29
Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k) 29
Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) ..... *passim*
Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B)(i) 29
8 U.S.C. 1445 3
8 U.S.C. 1446(a) 3
8 U.S.C. 1446(b) 3
8 U.S.C. 1446(d) 3
8 U.S.C. 1447(b) ..... *passim*
28 U.S.C. 1254(1) 2
8 C.F.R. Pt. 334 3
8 C.F.R. 335.1 3

Page

Regulations—continued:

8 C.F.R. 335.2 3
8 C.F.R. 335.2(b) 3, 25
8 C.F.R. 335.3(a) 3

Miscellaneous:

Julia Preston, *Federal Suit Is Seeking To Expedite Citizenship*, N.Y. Times, Dec. 5, 2007, at A28 3
Julia Preston, *Surge Brings New Immigration Backlog*, N.Y. Times, Nov. 23, 2007, at A26 3
USCIS, *Update: USCIS Clarifies Criteria To Expedite FBI Name Check* (Feb. 20, 2007) <tinyurl.com/uscispolicy> 26
USCIS, *USCIS, FBI Eliminate National Name Check Backlog* (June 22, 2009) <tinyurl.com/uscisbacklog> 28

In the Supreme Court of the United States

No.

ALEXANDRE ARONOV, PETITIONER

v.

JANET NAPOLITANO,
SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Alexandre Aronov respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-59a) is reported at 562 F.3d 84. The opinion of the court of appeals panel (App., *infra*, 60a-107a) is reported at 536 F.3d 30. The district court's order granting petitioner's motion for attorney's fees and costs (App., *infra*, 108a-114a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2009. On July 7, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In relevant part, the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), provides:

> [A] court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

After United States Citizenship and Immigration Services (USCIS) failed to act in a timely manner on his application for naturalization, petitioner brought suit against respondents in the United States District Court for the District of Massachusetts, asking the court either to adjudicate his application or to order USCIS to do so. The district court remanded the case to USCIS so that it could grant his application for naturalization by a specified date. The court then granted petitioner's motion for attorney's fees and costs under the Equal Access to Justice Act (EAJA). App., *infra*, 108a-114a. A panel of the court of appeals initially affirmed the fee award. *Id.* at 60a-107a. After granting rehearing en banc, however, the court of appeals reversed. *Id.* at 1a-59a.

1. Naturalization is the process by which a person not born in the United States becomes an American citizen. In order to be naturalized, an individual must submit an application to USCIS (formerly the Immigration and Naturalization Service (INS)). 8 U.S.C. 1445; 8 C.F.R. Pt. 334. The applicant must first undergo a background investigation. 8 U.S.C. 1446(a); 8 C.F.R. 335.1. The applicant must then undergo an in-person examination conducted by a USCIS officer. 8 U.S.C. 1446(b); 8 C.F.R. 335.2. USCIS may not ask the applicant to appear for the examination until it has received "a definitive response" from the Federal Bureau of Investigation (FBI) that a "full criminal background check" has been completed. 8 C.F.R. 335.2(b).

USCIS must determine whether to grant or deny the application either at the time of the examination itself or within 120 days of the examination. 8 U.S.C. 1446(d); 8 C.F.R. 335.3(a). Critically for present purposes, if USCIS fails to make a determination within the 120-day period, the applicant "may apply to the United States district court for the district in which the applicant resides for a hearing on the matter." 8 U.S.C. 1447(b). That court may either "determine the matter" or "remand the matter, with appropriate instructions, to [USCIS] to determine the matter." *Ibid.*

As has been widely reported, the naturalization process has been wracked with delays in recent years, in part because of problems in conducting background investigations. See, *e.g.*, Julia Preston, *Federal Suit Is Seeking To Expedite Citizenship*, N.Y. Times, Dec. 5, 2007, at A28 (noting that "[b]acklogs of F.B.I. background checks from past naturalization petitions are dogging the Citizenship and Immigration Services agency"); Julia Preston, *Surge Brings New Immigration Backlog*, N.Y. Times, Nov. 23, 2007, at A26 (noting that

"backlogs * * * have burdened the United States immigration system for years" and that "[t]he deluge has been so great that the agency is struggling to send out notices acknowledging it has received * * * applications [for naturalization]").

2. Petitioner is a native of Russia who married an American citizen and subsequently became a permanent resident of the United States. On May 22, 2004, petitioner submitted an application for naturalization to USCIS. On February 14, 2005, a USCIS officer examined petitioner concerning his application. Contrary to the applicable regulatory requirements, however, USCIS had not yet completed its background investigation. Despite numerous inquiries, petitioner heard nothing from USCIS for more than a year following his examination. On March 23, 2006, petitioner received a letter from USCIS indicating that his application was still being processed. App., *infra*, 4a-5a, 33a-34a, 108a-109a.

On August 28, 2006—more than eighteen months after his examination—petitioner brought suit against respondents in the United States District Court for the District of Massachusetts. C.A. App. 54-62. As is relevant here, petitioner sought relief under 8 U.S.C. 1447(b) on the ground that USCIS had failed to make a determination on his naturalization application within 120 days of his examination. C.A. App. 55-56. Accordingly, petitioner asked the court either to adjudicate his application or to order USCIS to do so. *Id.* at 57.

At the time of petitioner's lawsuit, USCIS had a written policy of expediting background investigations for those applicants who sued the agency to challenge delays in processing their naturalization applications. See C.A. App. 45. Consistent with that policy, after petitioner brought suit, USCIS promptly completed its background investigation and determined that his application should

be granted. On October 6, 2006, the parties filed a joint motion to remand the case to USCIS "so that it c[ould] grant [petitioner's] application for naturalization and schedule [petitioner] for an oath ceremony for no later than November 8, 2006." *Id.* at 52. On October 12, the district court granted the motion in a summary order. See *id.* at 50. On November 8, petitioner was sworn in as an American citizen. See App., *infra*, 2a, 109a.

Petitioner then filed a motion for attorney's fees and costs under EAJA. In order to obtain fees under EAJA, a movant must show that he was a "prevailing party"; if he does so, the burden shifts to the government to show that fees should not be awarded because its position was "substantially justified." 28 U.S.C. 2412(d)(1)(A).

The district court granted petitioner's motion. App., *infra*, 108a-114a. The district court first determined that, for purposes of EAJA, petitioner was a "prevailing party." *Id.* at 110a-111a. The district court explained that, in order to qualify as a prevailing party under this Court's decision in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), a plaintiff must show that there was "judicial imprimatur" on a material change in the legal relationship between the parties. App., *infra*, 110a. The district court concluded that the "judicial imprimatur" requirement was met because, in its earlier order, it had "remanded specifically so that USCIS c[ould] grant [petitioner's] application for naturalization, and schedule [petitioner's] oath ceremony for no later than November 8, 2006." *Id.* at 110a-111a (internal quotation marks and citation omitted). The court reasoned that "the government here was granted not a dismissal, but a remand to the agency *conditional on* the granting of [petitioner's] naturalization action by November 8, 2006." *Id.* at 111a. "Had the naturalization not so oc-

curred," the court continued, "the parties might very well be back in front of this Court litigating a contempt action." *Ibid.*

The district court then determined that, for purposes of EAJA, the government's position was not "substantially justified." App., *infra*, 111a-113a. The court explained that, in this case, "the bottom line is that the government unjustifiably delayed [petitioner's] naturalization [processing], forcing him to file a [Section 1447(b)] action at personal expense; indeed, the government's internal expedite procedures formally establish this as one way for applications to be 'expedited' (or rather, completed on time)." *Id.* at 113a. The court concluded that "[i]t is not 'substantially justified' for the government to force naturalization applicants to incur additional expense—and the courts to be burdened—just to have naturalization applications processed in the timely manner already supposedly guaranteed by statute (or, more correctly, to slightly mitigate the already unlawful delay in that processing)." *Ibid.*

The district court awarded petitioner attorney's fees and costs in the amount of $4,270.94, based on a total of 22½ hours of attorney time. App., *infra*, 114a; C.A. App. 22.

3. The government appealed the fee award, and a divided panel of the court of appeals initially affirmed. App., *infra*, 60a-107a. After granting the government's petition for rehearing en banc, however, the court of appeals reversed by a 3-2 vote. *Id.* at 1a-59a.

a. The en banc court of appeals first held that, for purposes of EAJA, petitioner was not a prevailing party. App., *infra*, 8a-18a. At the outset, the court of appeals agreed with the district court that, under *Buckhannon*, the appropriate inquiry was whether there was "judicial imprimatur" on a material change in the legal relation-

ship between the parties. *Id.* at 9a. According to the court of appeals, "*Buckhannon* explicitly identified two and only two situations which meet the judicial imprimatur requirement: where plaintiff has received a judgment on the merits * * * or obtained a court-ordered consent decree." *Id.* at 9a-10a (internal quotation marks and citation omitted).

The court of appeals observed that "[t]he order here was plainly not a judgment on the merits, nor was it labeled a court-ordered consent decree." App., *infra*, 10a (internal quotation marks omitted). The court conceded that, for a court order to qualify as a "court-ordered consent decree," "the formal label of 'consent decree' need not be attached; it is the reality, not the nomenclature which is at issue." *Id.* at 10a-11a. But the court asserted that, for an order to qualify as the equivalent of a consent decree for purposes of *Buckhannon*, "the change in legal relationship must be court-ordered"; "there must be judicial approval of the relief vis-à-vis the merits of the case"; and "there must be judicial oversight and ability to enforce the obligations imposed by the parties." *Id.* at 12a (internal quotation marks and citation omitted). Applying that standard, the court determined that the order at issue "lacked all of the core indicia of a consent decree." *Id.* at 14a-15a. The court of appeals explained that the district court "did not order USCIS to do anything"; the district court "made no evaluation at all of the merits of the controversy" but instead merely "dismiss[ed] the case"; and the order "did not contain provisions for future enforcement typical of consent decrees." *Id.* at 15a-16a. The court of appeals concluded

that "[t]he order remanding to the agency is alone not enough to establish the needed imprimatur." *Id.* at 18a.[1]

The court of appeals next held that, for purposes of EAJA, the government's position was substantially justified. App., *infra*, 18a-28a. The court reasoned that "[t]he decision by the agency not to grant [petitioner] citizenship until his background check was completed, even if that exceeded 120 days, stemmed from two statutory mandates under which the agency must operate": *viz.*, the mandates that all applicants undergo background investigations and that such investigations must include full background checks by the FBI. *Id.* at 21a. The court acknowledged that, under the applicable regulatory requirements, USCIS was required to act on applications within 120 days of examinations (and that petitioner "was mistakenly given a premature initial examination"). *Id.* at 25a. The court nevertheless concluded that, "[a]t most, * * * this is a situation in which an agency has imposed regulatory requirements on itself that are in tension, and the solution it chose, to bend the 120-day rule because the background check was not completed, is entirely reasonable." *Ibid.* Conversely, the court added, "the choice by USCIS to favor national security in requiring a full check of the background of a

---

[1] In a footnote, the court of appeals noted that the Tenth Circuit's decision in *Al-Maleki* v. *Holder*, 558 F.3d 1200 (2009), which had awarded fees under EAJA in similar circumstances, was "factually distinguishable" because the underlying order in that case "expressly direct[ed] the USCIS to administer the oath of citizenship to the applicant." App., *infra*, 15a n.12. After noting that distinction, however, the court added that its decision "should not be taken as agreement with the panel decision of the Tenth Circuit on this or any other point." *Id.* at 16a n.12.

citizenship applicant over a self-imposed 120-day deadline * * * cannot be unreasonable." *Ibid.*

The court of appeals rejected petitioner's contention that the government's position was not substantially justified because it "created an incentive system which requires candidates to sue to get priority in having FBI name checks done." App., *infra*, 27a-28a. The court reasoned that "the logic of [petitioner's] argument is to impose EAJA fees on [USCIS] in the numerous instances it has benefitted an applicant by giving priority to the applicant's name check." *Id.* at 27a.

b. Judge Lipez, joined by Judge Torruella, dissented. App., *infra*, 32a-59a. He contended that the majority's approach was "unwarranted, unwise, and contrary to the purpose and promise of the EAJA." *Id.* at 33a.

With regard to whether petitioner was a prevailing party, Judge Lipez first determined that the change in the legal relationship between petitioner and USCIS was court-ordered. App., *infra*, 39a-43a. He noted that, "[d]uring the litigation, only the district court possessed the authority to give [petitioner] the relief he requested," because USCIS lost jurisdiction to grant petitioner's application for naturalization once he filed suit. *Id.* at 39a. For that reason, "there had to be an intervening judicial order before [petitioner] could obtain relief." *Id.* at 39a-40a. Judge Lipez explained that "the remand order mandated a change in the legal relationship of the parties—namely, that [petitioner's] status change from alien to citizen through an oath ceremony that would take place no later than November 8, 2006." *Id.* at 40a-41a. He stated that "[t]here is no mistaking the district court's meaning here," because "[i]ts remand order incorporated by reference the joint motion of the parties and thereby ordered USCIS to fulfill the promise that it

made to [petitioner] and the court in the joint motion." *Id.* at 41a. Indeed, Judge Lipez noted, "[t]his was the district court's own understanding of its order." *Ibid.*

Judge Lipez next determined that the district court had satisfied the requirements for entering a consent decree. App., *infra*, 43a-46a. He noted that "[t]he complaint identified the factual and legal bases for providing relief" and that "[t]he joint motion isolated the relevant facts and law[] and asserted 'good cause' for remanding to the agency for naturalization." *Id.* at 45a. Thus, he reasoned, "the record contains adequate facts to support the court's decision to approve the proposed agreement and incorporate it in an order of the court." *Id.* at 46a.

Judge Lipez then determined that the district court retained jurisdiction to enforce its order in the event of noncompliance. App., *infra*, 46a-47a. He explained that the district court's incorporation in its order of the terms of the joint motion "was sufficient to retain jurisdiction for purposes of future enforcement." *Id.* at 47a. "Given this circumstance," he added, "if USCIS had failed to comply with the remand order, [petitioner] could have asked the court to issue an injunction confirming the naturalization obligation of USCIS and ordering compliance with it." *Id.* at 47a n.8. For all of the foregoing reasons, Judge Lipez concluded, "the court's remand order was the functional equivalent of a consent decree, and [petitioner] was a prevailing party." *Id.* at 48a-49a.[2]

With regard to whether the government's position was substantially justified, Judge Lipez contended that the majority's analysis "misconstrues what is at stake in this case." App., *infra*, 51a. He observed that "[t]here is

---

[2] Judge Lipez noted that the Tenth Circuit's decision in *Al-Maleki* was "strongly supportive of [his] analysis." App., *infra*, 49a n.9.

no challenge to the authority of USCIS to adopt the name check program as a policy"; instead, "[w]hat is challenged is the application of that policy in this instance." *Ibid.* Judge Lipez asserted that, "[a]lthough the majority acknowledges that the agency has adopted a regulation * * * that treats the 120-day time frame as a deadline, the majority regards the statutory and regulatory frame as merely aspirational, with no consequences for the agency if it fails to comply." *Id.* at 52a. Citing a "flood" of similar lawsuits under Section 1447(b), he noted that "it was the agency's *regular practice* to violate its own regulations by examining candidates before receiving [background investigation] results, and then to compound that error by missing the statutory and regulatory adjudication deadline." *Id.* at 54a. It would be "an indulgent reasonable person," Judge Lipez continued, "who would view this government conduct so benignly." *Ibid.*

Judge Lipez added that "USCIS could have addressed the name check delay in a manner consistent with the applicable laws and regulations," by conducting background investigations before examinations (and, where they had "mistakenly" conducted the examinations first, by expediting the background investigations for those applicants). App., *infra*, 57a. "What the agency surely cannot do with 'substantial justification,'" however, "is blatantly ignore the requirements imposed on it by Congress and by itself." *Ibid.*

Judge Lipez concluded that "[t]he majority's fierce embrace of the government's opposition to this modest award is out of all proportion to the stakes." App., *infra*, 59a. He contended that "[the majority's] refusal to credit the district court's explanation of its remand order is unprecedented," and "[i]ts invocation of national security

concerns to justify the government's handling of [petitioner's] application is unjustified." *Ibid.*

c. Judge Torruella also dissented. App., *infra*, 29a-32a. He wrote separately to criticize the majority for applying "varying standards when judging governmental power as compared to those that apply to citizen challenges to government authority." *Id.* at 29a. In Judge Torruella's view, the majority "adopt[ed] amorphous policy interests alleged by the government through bombastic exaggeration and doomsday predictions in its en banc petition," *id.* at 29a-30a, and improperly "reli[ed] on the government's attenuated insinuations that our national security will be threatened by ruling against it," *id.* at 31a-32a.[3]

REASONS FOR GRANTING THE PETITION

In this case, the en banc First Circuit held that an applicant for naturalization who brings suit under 8 U.S.C. 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is not entitled to attorney's fees and costs under the Equal Access to Justice Act. That decision conflicts with a decision of the

---

[3] Judge Torruella also asserted that the majority's decision conflicted with the Tenth Circuit's decision in *Al-Maleki*. App., *infra*, 31a n.3. Specifically, he contended that the majority's decision "effectively * * * create[d] a circuit split" because "the functional posture of both cases is the same: the district court agreed with the parties' joint request for remand for the purpose of allowing the plaintiff's application [for naturalization]." *Ibid.* He criticized the majority for "simultaneously admit[ting] that [*Al-Maleki*] may be contrary to its view while attempting to distinguish it on the thinnest of grounds": primarily, on the ground that "the remand order in that case was slightly more detailed." *Ibid.* "These differences in formatting," Judge Torruella concluded, "are not relevant to the effect and force of the remand order." *Ibid.*

Tenth Circuit involving materially identical facts; it presents an issue that has recurred with great frequency in the lower courts; and it implicates broader uncertainty among the lower courts on the issue of when a court order renders a party "prevailing" for purposes of EAJA. The First Circuit's analysis, moreover, was deeply flawed, because an applicant who obtains a court-ordered remand under these circumstances is a "prevailing party" in any sense of that phrase, and the government's position in failing to comply with an unambiguous regulatory obligation cannot plausibly be said to be substantially justified. As the government has previously recognized, this case presents an issue of exceptional importance, and it constitutes an excellent vehicle in which to consider the issue. In short, this case meets all of the Court's criteria for further review, and certiorari should therefore be granted.

A. The Decision Below Conflicts With A Decision Of The Tenth Circuit And Implicates Broader Disarray Among The Lower Courts

1. The decision of the en banc First Circuit conflicts with the decision of the Tenth Circuit in *Al-Maleki* v. *Holder*, 558 F.3d 1200 (2009). This Court should intervene to resolve that conflict.

a. In *Al-Maleki*, as in this case, an applicant for naturalization brought suit under Section 1447(b) after USCIS erroneously conducted an examination before completing its background investigation, then failed to act on his application within the prescribed 120-day period. 558 F.3d at 1203. In the lawsuit, the applicant asked the court either to adjudicate his application or to order USCIS to do so. *Ibid.* After the district court refused to grant the government's motion for an open-ended remand to USCIS, the parties filed a joint motion to remand so that USCIS could grant the application for

naturalization and schedule the applicant for an oath ceremony by a specified date. *Ibid.* The district court granted the motion, and the applicant subsequently moved for attorney's fees under EAJA. *Ibid.*

Unlike the First Circuit in this case, the Tenth Circuit upheld the award of fees. The court first concluded that the applicant was a prevailing party. 558 F.3d at 1204-1206. It reasoned that "the district court resolved the litigation *before* USCIS could voluntarily naturalize [the applicant]." *Id.* at 1205. It added that the district court's order "placed the weight of judicial authority behind USCIS's stipulation that [the applicant] was entitled to be naturalized by imposing a *judicially enforceable* obligation on USCIS to naturalize [the applicant] by a date certain," and, as such, "provided the judicial imprimatur which is indispensable to the prevailing party determination." *Id.* at 1206. The court then concluded that the government's position was not substantially justified. *Id.* at 1206-1210. It explained that, even "ignor[ing] the uncontroverted fact that USCIS violated its own regulations by conducting [the applicant's] initial examination before the comprehensive background investigation was completed," *id.* at 1208, the government's actions were unreasonable because USCIS was able to expedite the applicant's background investigation, but did not do so until after he brought suit. *Id.* at 1209.

b. The Tenth Circuit's decision in *Al-Maleki* conflicts not only with the decision below, but also with unpublished decisions of the Fifth and Ninth Circuits. In *Othman* v. *Chertoff*, 309 Fed. Appx. 792 (5th Cir. 2008) (per curiam), a similarly situated applicant brought suit under Section 1447(b); the government subsequently filed an unopposed motion to remand the case to USCIS so that it could act on the application for naturalization

by a specified date. *Id.* at 793. After the district court granted the motion, it denied the applicant's motion for fees under EAJA, and the court of appeals affirmed. *Id.* at 793-794. The court of appeals held that the applicant was not a prevailing party because, notwithstanding the fact that the district court's order explicitly directed USCIS to act on the application by a specified date, "[t]he district court entered neither an enforceable judgment nor a consent decree"; as such, the court concluded, the order "lacked the 'judicial imprimatur' necessary to confer prevailing-party status on [the applicant]." *Id.* at 794.

In *Al-Shaibani* v. *Holder*, Nos. 08-35385, 08-35387 & 08-35388, 2009 WL 2257612 (9th Cir. July 29, 2009), similarly situated applicants brought suit under Section 1447(b); the parties subsequently agreed to remand the cases to USCIS, and the district court remanded on the condition that, if USCIS granted the applications for naturalization, it do so by a specified date. As in *Othman*, after the district court remanded, it denied the applicants' motions for fees under EAJA. The court of appeals summarily affirmed, reasoning that the district court's orders "did not require [USCIS] to do something directly benefitting the plaintiff[s] that [it] otherwise would not have had to do." *Id.* at *1 (internal quotation marks and citation omitted).

c. In this case, the en banc First Circuit suggested that, at least with regard to whether the applicant was a prevailing party, the Tenth Circuit's decision in *Al-Maleki* was factually distinguishable on the ground that the district court's order here, unlike the order at issue in *Al-Maleki*, did not expressly direct USCIS to act on the application for naturalization by a specified date. See App., *infra*, 15a n.12. However, as Judge Torruella pointed out in dissent—and as even the majority appears

to have acknowledged—that distinction is formalistic and ultimately illusory. See *id.* at 16a n.12 (stating, after noting that distinction, that the court's decision "should not be taken as agreement with the panel decision of the Tenth Circuit on this or any other point"); *id.* at 31a n.3 (dissenting opinion).[4]

It is true that, in this case, the district court simply entered a summary order granting the parties' joint motion to remand. See C.A. App. 50. That order, however, is naturally understood to incorporate the terms of the joint motion: specifically, the government's agreement to grant petitioner's application for naturalization by a specified date. That is evidently how the district court itself understood the order, see App., *infra*, 111a, and for good reason: as the district court suggested, if it had intended not to impose a judicially enforceable obligation to act on USCIS, it would simply have dismissed the action outright, as courts routinely do when parties in litigation reach a settlement that does not contemplate judicial enforcement. See *ibid.*[5] Instead, the district

---

[4] In a letter bringing *Al-Maleki* to the en banc First Circuit's attention after oral argument, the government took a similarly ambivalent position. See Letter from Keith I. McManus, Senior Litigation Counsel, Office of Immigration Litigation, to Richard C. Donovan, Clerk of the Court, at 1 (Mar. 25, 2009) (contending that "this case is factually distinguishable from *Al-Maleki*," but conceding that "the two cases are somewhat similar" and that "there is at least some overlap between the arguments raised by the government in *Al-Maleki* and those advanced by [respondents] here").

[5] Notably, that is also how the Fifth Circuit understood the district court's order when it attempted to distinguish the panel's initial decision in this case. See *Othman*, 309 Fed. Appx. at 794 (noting that the district court in this case "ordered a particular result to be reached by [USCIS]").

court remanded the case—and, in so doing, retained the ability to take subsequent action in the event that the government failed to comply with its agreement to grant petitioner's application by the specified date.

Because the district court's order is functionally indistinguishable from the order at issue in *Al-Maleki*, the decisions in the two cases are in direct conflict. Nor will that conflict be resolved absent this Court's intervention, because the decision below was issued by the en banc First Circuit (and the government declined to seek en banc review of the Tenth Circuit's decision in *Al-Maleki*). The resulting conflict therefore merits the Court's review.

2. In addition to the foregoing conflict among the courts of appeals, the federal district courts are in complete disarray as to the availability of fees under EAJA for applicants who have brought suit, and obtained relief, under Section 1447(b). We are aware of at least 50 cases *since 2007* in which district courts have considered whether to award fees under EAJA in Section 1447(b) actions. In many of those cases, district courts have held that, where, as here, an applicant obtains a court-ordered remand (by means of a joint motion or stipulation) so that USCIS can grant his application for naturalization, the applicant is a prevailing party for purposes of EAJA. See, *e.g.*, *Irahim* v. *Chertoff*, No. 07-2415, 2009 WL 385782, at *2 (E.D. Cal. Feb. 10, 2009); *Berishev* v. *Chertoff*, 486 F. Supp. 2d 202, 205-206 (D. Mass. 2007); *Al-Ghanem* v. *Gonzales*, No. 06-320, 2007 WL 446047, at *2 (D. Utah Feb. 7, 2007). In fact, some courts have held that an applicant is a prevailing party even where the court orders a remand *over the applicant's objection*. See, *e.g.*, *Ali* v. *Mukasey*, 543 F. Supp. 2d 1272, 1274-1275 (W.D. Wash. 2008). By contrast, other courts, like the First Circuit in this case, have held that an applicant

who obtains a court-ordered remand so that USCIS can grant his application for naturalization is not a prevailing party. See, *e.g.*, *Wagner* v. *Chertoff*, 607 F. Supp. 2d 1192, 1197-1199 (D. Nev. 2009).

Numerous district courts have also addressed the issue whether the government's position was substantially justified where, as here, the government erroneously conducted premature examinations of applicants for naturalization and then failed to comply with the 120-day deadline for acting on their applications. The vast majority of courts have held that the government's position was not substantially justified, often citing the fact that the government's obligation to comply with the 120-day deadline was unambiguous and nondiscretionary. See, *e.g.*, *Shalash* v. *Mukasey*, 576 F. Supp. 2d 902, 910-911 (N.D. Ill. 2008); *Osman* v. *Mukasey*, 553 F. Supp. 2d 1252, 1256-1258 (W.D. Wash. 2008); *Liu* v. *Chertoff*, 538 F. Supp. 2d 1116, 1122-1123 (D. Minn. 2008). As one court put it, "this is a mess of USCIS's own making," because "USCIS could have avoided the present problem entirely by following its own regulations." *Aboeleyoun* v. *USCIS*, No. 07-1927, 2008 WL 1883564, at *4 (D. Colo. Apr. 25, 2008). Like the First Circuit, however, a smaller number of courts have held that the government's position was substantially justified. See, *e.g.*, *Wagner*, 607 F. Supp. 2d at 1199-1201; *Almudallal* v. *USCIS*, No. 07-2040, 2008 WL 1995360, at *3-*4 (N.D. Ohio May 5, 2008); *Simonovskaya* v. *Chertoff*, No. 06-11745, 2007 WL 210391, at *1-*2 (D. Mass. Jan. 26, 2007). The chaos in the district courts, as to each relevant prong of the EAJA inquiry, provides an additional justification for further review here.

3. This case also implicates broader uncertainty among the courts of appeals as to when a court order renders a party "prevailing" for purposes of EAJA. In

Buckhannon, this Court indicated that the relevant inquiry is whether there was a "judicially sanctioned change in the legal relationship of the parties," or "judicial *imprimatur* on the change." 532 U.S. at 605. As examples of cases in which the necessary imprimatur exists, the Court cited "enforceable judgments on the merits and court-ordered consent decrees." *Id.* at 604.

In cases in which the order in question "falls somewhere between a consent decree and a purely private settlement in the degree of judicial involvement," however, courts of appeals have struggled since *Buckhannon* to determine "how much or what kind of judicial imprimatur must be stamped on [a court order] before it renders a party 'prevailing.'" *Utility Automation 2000, Inc.* v. *Choctawhatchee Electric Cooperative, Inc.*, 298 F.3d 1238, 1250 (11th Cir. 2002) (Marcus, J., specially concurring).[6] Those courts have taken three general approaches. On one end of the spectrum, at least one court of appeals has adopted the hard-line position that, unless a court order "serves essentially as a consent decree," it cannot render a party "prevailing," even if the issuing court retained jurisdiction to enforce the terms of the parties' agreement. *Christina A. ex rel. Jennifer A.* v. *Bloomberg*, 315 F.3d 990, 993-994 (8th Cir. 2003). Notably, in its brief to the en banc First Circuit in this case, the government took a similarly rigid position, arguing in the first instance that "*Buckhannon* limit[ed] its holding to *actual* consent decrees" and that "requiring an actual

[6] The other major issue on which courts of appeals have disagreed in the wake of *Buckhannon* is whether, in the absence of a final judgment, a party that obtains a preliminary injunction may qualify as a prevailing party for purposes of EAJA. This Court recently reserved that question. See *Sole* v. *Wyner*, 551 U.S. 74, 85 (2007).

consent decree before awarding fees provides a bright-line rule that can easily be applied." Gov't C.A. Supp. Br. 5.

Most courts of appeals have read *Buckhannon* more broadly and held that, as long as an order operates as the "functional equivalent" of a consent decree, it can confer prevailing-party status. Even among those courts, however, there are substantial differences in approach. Some courts have taken a more avowedly functional approach and focused on two factors: (1) whether the issuing court conducted some substantive review of the terms of the parties' agreement, and (2) whether the court retained jurisdiction to enforce those terms. See, *e.g.*, *Bell* v. *Board of County Commissioners*, 451 F.3d 1097, 1103 (10th Cir. 2006); *Smalbein ex rel. Estate of Smalbein* v. *City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (per curiam); *Roberson* v. *Giuliani*, 346 F.3d 75, 82-83 (2d Cir. 2003); *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268, 280-285 (4th Cir.), cert. denied, 537 U.S. 825 (2002). Other courts have taken a similar but more formalistic approach and considered factors such as whether the court order was styled as an order, contained mandatory language, and bore the judge's signature. See, *e.g.*, *Walker* v. *Calumet City*, 565 F.3d 1031, 1035 (7th Cir. 2009); *Davy* v. *CIA*, 456 F.3d 162, 166 (D.C. Cir. 2006); *John T. ex rel. Paul T.* v. *Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003).

Finally, at the other end of the spectrum, at least one court of appeals has taken a still more expansive view of what constitutes the necessary "judicial imprimatur," requiring only that the court order at issue provide "some judicial sanction" of the parties' agreement. *P.N.* v. *Seattle School District No. 1*, 474 F.3d 1165, 1173 (9th Cir. 2007). Thus, that court has held that an order spe-

cifically referring to a settlement agreement (and reflecting the parties' understanding of the binding nature of the agreement) could confer prevailing-party status, based on the totality of the circumstances, even though the issuing court apparently conducted no substantive review of the agreement's terms and did not retain jurisdiction to enforce them. See *Richard S.* v. *Department of Developmental Services*, 317 F.3d 1080, 1088 (9th Cir. 2002).

A decision by the Court in this case would therefore not only resolve the circuit conflict on the availability of fees under EAJA in Section 1447(b) actions, but also shed badly needed light on the broader issue of what type of order is sufficient to render a party "prevailing" under EAJA (and other fee-shifting statutes). The Court's review is therefore warranted.

B. The Court Of Appeals' Decision Is Erroneous

The en banc First Circuit erred, moreover, in holding that an applicant for naturalization who brings suit under Section 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is not entitled to attorney's fees and costs under EAJA. That holding was flawed in two critical respects.

1. The court of appeals first erred by concluding that, for purposes of EAJA, petitioner was not a prevailing party. See App., *infra*, 8a-18a. In *Buckhannon*—the pathmarking decision on prevailing-party status under fee-shifting statutes such as EAJA—this Court rejected the "catalyst theory," under which a plaintiff could be a prevailing party "if it achieve[d] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" (in that case, because the plaintiffs' lawsuit had triggered the repeal of the statutory provisions at issue). 532 U.S. at 600-601. In rejecting

the "catalyst theory," the Court observed that a prevailing party is one that "has been awarded some relief *by the court*." *Id.* at 603 (emphasis added). The Court therefore distinguished between cases involving a "voluntary change in conduct," on the one hand, and cases involving a "judicially sanctioned change in the legal relationship of the parties" or "judicial *imprimatur* on the change," on the other. *Id.* at 605. As noted above, see p. 19, *supra*, the Court cited "enforceable judgments on the merits and court-ordered consent decrees" as examples of cases in which the necessary imprimatur exists. 532 U.S. at 604.

Where, as here, a court in a Section 1447(b) action issues a remand so that USCIS can grant an application for naturalization, the court's order works the necessary "judicially sanctioned change in the legal relationship of the parties" for purposes of *Buckhannon*. As a threshold matter, it is clear, and the government does not contend otherwise, that a material "change in the legal relationship of the parties" occurs in cases such as this one, because the applicant goes from having an application for naturalization pending to having it acted upon and granted. See, *e.g.*, App., *infra*, 40a-41a (Lipez, J., dissenting); *id.* at 66a (panel opinion); *id.* at 110a (district court order). That change, moreover, is "judicially sanctioned," because the remand order is indispensable to providing the applicant his desired relief. Absent some judicial action, USCIS would lack jurisdiction to act on the application for naturalization, see, *e.g.*, *Etape* v. *Chertoff*, 497 F.3d 379, 383-387 (4th Cir. 2007); *United States* v. *Hovsepian*, 359 F.3d 1144, 1159-1164 (9th Cir. 2004) (en banc), and it is therefore the "[e]ntry of the [remand] order" that "indelibly alter[s] the legal landscape between" the applicant and USCIS, *Al-Maleki*, 558 F.3d at 1206 (internal quotation marks and citation omitted). As

discussed above, moreover, the only plausible understanding of the remand order in this case is that it necessarily incorporated the government's commitment to act upon and grant petitioner's application for naturalization by a specified date, see pp. 16-17, *supra*—and, for that reason, the remand order contemplated the "judicial approval and oversight" that is absent from a voluntary dismissal pursuant to a settlement. *Buckhannon*, 532 U.S. at 604 n.7. Cases such as this one are therefore distinguishable from cases such as *Buckhannon*, because they possess the "stuff of which legal victories are made." *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987).

In reaching the contrary conclusion, the court of appeals focused on whether the remand order was the "functional equivalent of a consent decree"—or, as the court of appeals put it, "whether the order contains the sort of judicial involvement and actions inherent in a 'court-ordered consent decree.'" App., *infra*, 11a. In so doing, however, the court of appeals missed the forest for the trees, because *Buckhannon* merely cited "court-ordered consent decrees," along with "enforceable judgments on the merits," as non-exclusive *examples* of the types of orders that work the necessary judicially sanctioned change. 532 U.S. at 604.

In any event, even if the order in question must be identical (or, at a minimum, closely analogous) to the types of orders cited in *Buckhannon*, the remand order in this case satisfies that requirement. As a preliminary matter, notwithstanding the court of appeals' apodictic conclusion to the contrary, see App., *infra*, 10a, the remand order constituted the equivalent of an "enforceable judgment on the merits." By its terms, Section 1447(b) contemplates two forms of relief: (1) a "determin[ation] of the matter" by the district court itself, and (2) a "remand [of] the matter, with appropriate instructions, to

[USCIS] to determine the matter." In the complaint in this case, petitioner sought both forms of relief, see C.A. App. 57, and he ultimately obtained the latter, see *id.* at 50. The court of appeals' conclusion that the remand order was not tantamount to a judgment on the merits is in serious tension, and arguably in outright conflict, with this Court's decision in *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), in which the Court held that a statutorily authorized remand order to the Social Security Administration constituted a "final judgment" that triggered the time period for filing an EAJA application (and further indicated that the remand order rendered the plaintiff a prevailing party for EAJA purposes). See *id.* at 300-302.

Even if the remand order does not constitute the equivalent of an "enforceable judgment on the merits," however, it is closely analogous to a consent decree, because, like a consent decree, it provides judicial sanction for the terms of the parties' agreement. See pp. 22-23, *supra*. In reaching the contrary conclusion, the court of appeals devised a three-part test for determining whether a court order is sufficiently analogous to a consent decree, under which "the change in legal relationship must be court-ordered"; "there must be judicial approval of the relief vis-à-vis the merits of the case"; and "there must be judicial oversight and ability to enforce the obligations imposed on the parties." App., *infra*, 12a (internal quotation marks and citation omitted).

Assuming, *arguendo*, that the court of appeals' test is the correct one, the court of appeals erred by concluding that the test was not satisfied here, largely for the reasons stated by Judge Lipez in his dissent. See App., *infra*, 39a-49a. As to the first requirement, the remand order did work a court-ordered change in the legal relationship, because it was indispensable in ensuring that petitioner's application for naturalization was acted upon

and granted. See *id.* at 39a-43a. As to the second requirement, the remand order provided judicial approval of the relief petitioner sought, because the joint motion to remand stated that there was "good cause" to remand the case for naturalization (and the district court possessed the authority to deny the motion if it disagreed). See *id.* at 43a-46a. And as to the third requirement, the district court retained the ability to take subsequent action in the event that the government failed to comply with its agreement to grant petitioner's application by the specified date. See *id.* at 46a-47a. Because the remand order worked a judicially sanctioned change (and in any event was either identical or analogous to a judgment on the merits or a consent decree), the court of appeals erred by concluding that, for purposes of EAJA, petitioner was not a prevailing party.

2. The court of appeals compounded that error by concluding that, for purposes of EAJA, the government's position was substantially justified. See App., *infra*, 18a-28a. The court of appeals' analysis rested entirely on a faulty premise: *viz.*, that, in processing petitioner's naturalization application, USCIS was subject to regulatory requirements that were "in tension," because it was required to conduct a detailed background investigation, on the one hand, but to process petitioner's application within 120 days of his examination, on the other. See, *e.g.*, *id.* at 25a. Assuming, *arguendo*, that USCIS was required to conduct the type of background investigation that it did, the court of appeals ignored the fact that USCIS could have satisfied both requirements by conducting the background investigation first (as USCIS's regulations require, see 8 C.F.R. 335.2(b)) and then acting on petitioner's application promptly after his examination. Far from "bend[ing] the 120-day rule," as the court of appeals euphemistically put it, App., *infra*, 25a, USCIS

utterly flouted that unambiguous obligation, and its decision to do so cannot be said to have been substantially justified. See, *e.g.*, *Role Models America, Inc.* v. *Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004); *Wilderness Society* v. *Babbitt*, 5 F.3d 383, 388-389 (9th Cir. 1993).

As in *Al-Maleki*, moreover, there is no reason to believe that USCIS could not have complied with the 120-day rule in this case even once it had committed its initial error of conducting petitioner's examination before completing his background investigation. See 558 F.3d at 1209. USCIS could have sought to expedite petitioner's background investigation—as, indeed, it did once petitioner actually brought suit. Respondents have not contended that USCIS was *unable* to do so; instead, at the time of petitioner's lawsuit, USCIS had a policy of expediting a background investigation only after an applicant filed suit to challenge the delay in processing his application. See C.A. App. 45.[7]

Aside from its acquiescence once petitioner brought suit, no aspect of the government's conduct in this case was substantially justified, and there is nothing inequitable about requiring the government to bear the modest cost of a suit that it effectively invited as a prerequisite of processing petitioner's naturalization application in a timely (or, to be accurate, somewhat less untimely) manner. Indeed, allowing applicants to recover fees in these circumstances would be wholly consistent with the underlying purposes of EAJA: namely, to "encourag[e] private parties to vindicate their rights and curb[]

---

[7] Unsurprisingly, that policy provoked widespread criticism, and USCIS later revoked it. See USCIS, *Update: USCIS Clarifies Criteria To Expedite FBI Name Check* (Feb. 20, 2007) <tinyurl.com/uscispolicy>.

* * * [the] unreasonable exercise of Government authority." *INS v. Jean*, 496 U.S. 154, 164 (1990) (internal quotation marks and citation omitted). This Court should grant review in order to eliminate the circuit conflict on the availability of EAJA fees and correct the court of appeals' flawed and counterintuitive approach.

C. The Question Presented Is An Important And Recurring One That Merits The Court's Review In This Case

1. The question presented in this case—*i.e.*, whether an applicant for naturalization who brings suit under Section 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is entitled to fees under EAJA—is one of "exceptional importance," as the government itself contended in seeking rehearing en banc in the First Circuit. Gov't C.A. Pet. for Reh'rg 9; see Gov't C.A. Supp. Br. 1 (reiterating that "[t]his case presents questions of great legal and practical significance").

To begin with, the question presented has recurred with great frequency in the lower courts. Because it appears to have been USCIS's "regular practice" to conduct examinations of naturalization applicants before their background investigations were completed, App., *infra*, 54a (Lipez, J., dissenting) (emphasis omitted), and because USCIS frequently has been unable to complete those background investigations within the prescribed 120-day period, there has been a "flood" of litigation under Section 1447(b) in recent years, as the government has acknowledged. See Gov't C.A. Pet. for Reh'g 2. Although nationwide statistics are not readily available, in the First Circuit alone (the smallest of the regional circuits), approximately 137 actions were filed in 2007 seeking review of delayed naturalization applications, see App., *infra*, 20a n.16, and the government has repre-

sented that, as of September 2008, there were approximately 1,200 potential Section 1447(b) actions in the circuit, see Gov't C.A. Pet. for Reh'g 14. Applicants for naturalization, moreover, have sought fees under EAJA in many of those cases; as noted above, we are aware of at least 50 cases since 2007 in which district courts have considered whether to award EAJA fees in Section 1447(b) actions. See p. 17, *supra*.[8] As the government suggested below, while the amount of money at stake in any given case is often relatively modest, the cumulative amount of money at stake in these cases may therefore be substantial. See Gov't C.A. Pet. for Reh'g 15; Gov't C.A. Supp. Br. 16-17.

To be sure, USCIS has purportedly been taking steps to address the specific problem that triggered the litigation in this case: *viz.*, the lengthy delays in completing background investigations for naturalization applicants. Earlier this year, USCIS announced that the FBI was now completing its portion of background investigations within 90 days in all cases, though it cautioned at the same time that "any information provided by the FBI * * * may require further evaluation" (thus potentially "result[ing] in additional delays in processing"). USCIS, *USCIS, FBI Eliminate National Name Check Backlog* (June 22, 2009) <tinyurl.com/uscisbacklog>. Particularly given the notorious problems that have plagued USCIS (and its predecessor agency INS) over the years, there is no reason to believe that USCIS will suddenly start processing all naturalization applications in a timely manner, such that litigation under Section 1447(b)

---

[8] That total, moreover, may understate the number of decisions on EAJA fees in Section 1447(b) actions, insofar as many orders on fee motions are not reported (or electronically available).

will disappear.[9] Indeed, Section 1447(b) was originally enacted in 1990—long before USCIS's recent problems with completing background investigations—for the specific purpose of affording a judicial forum to naturalization applicants in the event of processing delays, whatever their cause. See *Hovsepian*, 359 F.3d at 1163-1164 (discussing legislative history). Even if the causes for delay turn out to be different in future cases, therefore, the question presented in this case is likely to continue to recur, and thus warrants this Court's review.

As discussed above, moreover, a decision by the Court in this case would not only resolve the availability of fees under EAJA in Section 1447(b) actions, but also shed light on the broader issue of what is required to render a party a "prevailing party." See pp. 18-21, *supra*. As this Court has recognized, that issue arises in a broad range of contexts, because Congress regularly uses the phrase "prevailing party" as "a legal term of art" to "designat[e] those parties eligible for an award of litigation costs," *Buckhannon*, 532 U.S. at 603, and this Court has construed the phrase consistently across the many fee-shifting statutes in which it appears, see *id.* at 603 n.4. To take but a few examples, the phrase is used in the Americans with Disabilities Act, 42 U.S.C. 12205; the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k); and the Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B)(i). Regardless of the extent to which

---

[9] In fact, even after USCIS's announcement, Section 1447(b) actions continue to be filed around the country challenging USCIS's failure to complete background investigations in a timely manner. See, *e.g.*, *Hernandez* v. *Swacina*, No. 09-22642 (S.D. Fla. filed Sept. 4, 2009); *Saraf* v. *Napolitano*, No. 09-1520 (D.D.C. filed Aug. 11, 2009); *Iqbal* v. *Dorochoff*, No. 09-4910 (N.D. Ill. filed Aug. 11, 2009); *Agbotse* v. *Napolitano*, No. 09-1115 (W.D. Wash. filed Aug. 5, 2009).

the question presented recurs in the specific context of Section 1447(b) actions, therefore, a decision in this case would unquestionably have broader significance.

2. This case is an optimal vehicle for the Court's review, because it cleanly presents the question whether an applicant for naturalization who brings suit under Section 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is entitled to fees under EAJA—a question on which the circuits are in direct conflict. The facts of this case are typical of those of other Section 1447(b) actions. And there would be no benefit from further percolation in the lower courts, because the majority and dissenting opinions from the en banc First Circuit (like the Tenth Circuit's conflicting opinion in *Al-Maleki*) are comprehensive and well-reasoned.

Finally, if the Court does not grant review in this case, it is far from clear when the Court will be able to consider the question presented again. Although there has been a large number of cases in which plaintiffs in Section 1447(b) actions have sought fees under EAJA (and there will surely be more such cases in the future), relatively few of those cases have reached the court of appeals level. That is probably because the amount of money sought in the typical fee request in a Section 1447(b) case is relatively modest, and, where an applicant is unable to obtain fees from a district court in the first instance, the applicant is unlikely to be willing to run the risk of incurring a substantially larger amount of fees in the event of an unsuccessful appeal. This may therefore be a situation in which the Court has surprisingly little opportunity to consider an issue that in fact recurs with great frequency in the lower courts—a consideration that further counsels in favor of review in this case.

* * * * *

Because of the government's inability to cope with the administrative burdens of the naturalization process, a whole generation of immigrants has had to wait for additional months, even years, to procure the benefits of citizenship. Under the court of appeals' decision in this case, those new Americans whom the government has forced to bring suit in order to expedite the process will be welcomed into citizenship not only with a miniature flag and a copy of the Constitution, but also with a bill from their attorney. The court of appeals' decision threatens to reward the government for its shabby conduct in failing to comply with its unambiguous obligation to process naturalization applications in a timely manner. As Judge Lipez noted in dissent, the outcome here is "contrary to the purpose and the promise of the EAJA." App., *infra*, 59a. This Court should not allow that outcome to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GREGORY ROMANOVSKY
LAW OFFICES OF GREGORY ROMANOVSKY
12 Marshall Street
Boston, MA 02108

KANNON K. SHANMUGAM
ANA C. REYES
GEORGE W. HICKS, JR.
AMY R. DAVIS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

SEPTEMBER 2009